Supreme Court, U.S.
FILED

01 641 OCT 15 2001

OFFICE OF THE CLERK

In the

Supreme Court of the United States

ARA HISTED,

Petitioner,

versus

E.I. DUPONT DE NEMOURS AND COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Thomas Stephen Neuberger
Thomas S. Neuberger, P.A.
Two East Seventh Street
Suite 302
Wilmington, DE 19801
(302) 655-0582

Alice W. Ballard
Counsel of Record
Law Office of Alice W.
Ballard, P.C.
225 South 15th Street
Suite 1700
Philadelphia, PA 19102
(215) 893-9708

Attorney for Petitioners

QUESTION PRESENTED FOR REVIEW

In a *McDonnell-Douglas* employment discrimination case, where the plaintiff seeks to prove intent by showing that the employer's proffered reason is biased or incomplete, rather than false, may the district court limit the pretext inquiry to whether the employer's proffered reason is true or not?

PARTIES TO PROCEEDINGS

Petitioner: Maier McIlnay & Kerkman, Ltd.
No publicly traded company owns 10% or more of the company's stock.

Respondent: Ira Bodenstein, United States Trustee

Debtor: Milwaukee Engraving Company, Inc.
No publicly traded company owns 10% or more of the company's stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 8

CONCLUSION 10

APPENDIX

CIRCUIT COURT OPINION 1a

DISTRICT COURT DECISION 12a

ORDER DENYING REHEARING 13a

TABLE OF AUTHORITIES

CASES

BRAY V. MARRIOTT HOTELS, 110 F.3D 986, 993 (3D CIR. 1997) 9
CLAY V. HOLY CROSS HOSPITAL, 253 F.3D 1000, 1005 (7TH CIR. 2001) 8
EXCEL CORP. V. BOSLEY, 165 F.3D 635, 639 (8TH CIR. 1999) 8
MILLER V. CIGNA CORP., 47 F.3D 586, 597 (3D CIR. 1995) (EN BANC) 9
OLSON V. GE AEROSPACE, 101 F.3D 947, 955 (3D CIR. 1996) 9
ORTIZ V. NORTON, 254 F.3D 889, 896 (10TH CIR. 2001) ... 9
REEVES V. SANDERSON PLUMBING PRODUCTS, INC., 530 U.S. 133, 120 S. CT. 2097 (2000) 1
SMITH V. CHRYSLER CORP., 155 F.3D 799, 806 (6TH CIR. 1998) 8
SPRENGER V. SOUTHERN FED. HOME LOAN BANK OF DES MOINES, 253 F.3D 1106, 1112 (8TH CIR. 2001) 8
ST. MARY'S HONOR CENTER V. HICKS, 509 U.S. 502, 113 S. CT. 2742 (1993) 1

STATUTES

28 U.S.C. §1254(1) 2
29 U.S.C. § 623(a)(1) 2
42 U.S.C. §2000e-2 2

PETITION FOR A WRIT OF CERTIORARI

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000), this Court restated the principle that there are many ways for a Title VII plaintiff to prove intentional discrimination with circumstantial evidence.

Proof that the employer's explanation is unworthy of credence is just one of those ways. *Reeves, supra*, 530 U.S. at 147, 120 S. Ct. at 2108. Other ways include proof of biased remarks by influential managers, including those made outside the context of the adverse action, and proof that the employer faulted the plaintiff for a weakness that it had seized upon out of bias and documented in a result-oriented way. 530 U.S. at 151-52; 120 S. Ct. at 2110-11. But because the leading pretext decisions in the last decade (*Reeves, supra* and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993)) both involved attacks on the employer's credibility, courts often overlook the other ways to prove intent with circumstantial evidence.

This petition presents the question whether the plaintiff *has* to prove the employer's proffer false in order to win in a pretext case, even when that is not the theory of the plaintiff's case. Granting our petition will enable this Court to clarify that the ultimate question in a pretext case is not employer veracity *vel non*, but rather, intentional discrimination *vel non*, and that the question of the employer's veracity may or may not be relevant to that inquiry.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported, and appears in the Appendix at pages 2a - 11a. Its order denying Histed's petition for rehearing appears at Appendix pages 13a-14a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment for DuPont on June 14, 2001. On July 16, 2001, it denied Histed's timely petition for rehearing with suggestion of rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the 1964 Civil Rights Act (as amended), 42 U.S.C. §2000e-2, makes it unlawful for an employer to

> "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual, with respect to his compensation, terms, conditions or privileges of employment, because of such individual's sex."

The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1), makes it unlawful for an employer to

> "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual, with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age."

STATEMENT OF THE CASE

Factual Background

Ara Histed is the only female Instrument Technician at DuPont's Division of Facilities Services. She is one of the most senior employees in the job, and she performs at a consistently high level of expertise and skill. For years, she has been paid at the top level of her salary grade. She is 58 years old.

In 1995, Dupont promoted a younger man instead of Histed to the plum job of Specialist, having kept secret from the employees that there was a vacancy to be filled, what the selection criteria were, who was being considered, or which managers were doing the selecting. Histed sensed discrimination, and grieved the decision through DuPont's in-house procedure, starting with Human Resources, followed by talking with managers successively up the chain of command to her Vice-President. During that process, she was told that she had been held back by her "interpersonal skills".

Histed didn't doubt the veracity of DuPont's explanation for not promoting her. She had run into difficulties with her sexist boss, despite her efforts to steer clear of them. But she knew that if she had been a young man, she wouldn't have needed special skills to get along with a supervisor who hated women, and that her strengths, instead of being overlooked, would have earned her a promotion. She sued under Title VII and the ADEA.

Proceedings in the District Court

Through pre-trial *in limine* rulings and evidentiary rulings at trial, the district court refused to let Histed prove discrimination other than by challenging the credibility of

DuPont's proffered reason for not promoting her. The court explained its reasoning as follows:

> "Unless I misunderstand the case law, I think what happens is that the company comes forward with a statement as to the basis for its decision, and an employee is entitled to test the – accuracy and truthfulness of that basis.
>
> And so the issue of relevance is does – let's look at the definition of the term relevance.
>
> If you look at – relevant evidence means- evidence having any tendency to make the existence of any fact that is of consequence to determination of the action more or less probable than it would be without the evidence.
>
> What we need to do is stop and talk about what are the facts of consequence . . . *And the facts in consequence are the facts that have been identified by, as I understand it, by the DuPont Company, by the defendant, as to what the basis for its decision was or not. So they set that up. Those are the facts that we're relying on. And we then look to see are there facts relevant to show whether or not that's correct and that's truthful to test it.*
>
> Now, I think the difficulty I have with your definition of relevance is everything. Everything is relevant. Everything bears on – everything bears on everything. And I don't think that's quite correct. I think that it has to go to whether or not it's more probable than

> not that the matter that they've identified is correct or not.
>
> Now, the fact that someone said to her you're lying may or may not be relevant to the matter in issue. We've got to draw some kind of logical link between that statement and the *issues the DuPont Company has put in issue, the matters they put in issue.*" (emphasis supplied)

(excerpt from June 2, 1999 trial transcript).

Applying this rationale, the District Court excluded Histed's proof of bias, including her evidence that the promotions committee wittingly chose not to look at material which put Histed in her best light, that Histed's new supervisor as of the time of trial was trying to get her promoted and was mystified that he could not accomplish it; and that during her progress up the chain of command as she processed her grievance, one manager told Histed he "had goofed.. it shouldn't have been", one accused her of lying when she told him that her boss said "You have to learn to suck up, Ara" in order to get promoted, and that when the Vice-President saw her well-organized work area, he remarked, "Does your kitchen at home look this neat, Ara?"

When it charged the jury, the district court maintained the same narrow focus. The only substantive ruling it provided about how to prove discrimination was:

> "Once DuPont satisfies its burden by articulating a legitimate reason for its decision, the burden of production rebounds to Ms. Histed, who must now show by a preponderance of the evidence that DuPont's explanation is pretextual.

> Ms. Histed may show DuPont's reason is pretextual by producing evidence from which a reasonable factfinder could conclude either that DuPont's proffered justifications are not worthy of credence or that the true reason for DuPont's act was discrimination. You are entitled to infer, but need not infer, that age or sex was a motivating factor in DuPont's 1995 and 1996 promotion decisions, if you find that Ms. Histed has proven her prima facie case and you disbelieve DuPont's explanation for its decision.

(excerpt from district court's instructions to the jury).

The District Court refused to tell the jury that they could take stereotypical thinking, biased remarks, or departures from the normal procedural sequence as evidence of discrimination, and it refused to tell the jury that plaintiff need not prove DuPont's witnesses were lying to prove discrimination. Instead, it read them a dictionary definition of pretext which sounded as though lying were a *sine qua non* of the pretext concept. The judge said to the jury:

> "I think what I'm going to do is get the definition in the dictionary of pretext, since I know that . . .
>
> (Pause)
>
> I know that when I first ran across that word, I wasn't quite sure what people meant when they used it and I thought it would be helpful to do it. So let me back up. When I gave you a definition of pretext, use this as the definition of pretext and I've got my handy Webster's dictionary here. Pretext is defined in Webster's as

> a purpose or motive alleged for
> an appearance assumed in order
> to cloak the real intention or state
> of affairs.

That is, if we go back to Page 26, and the last full paragraph on the page, it says, once DuPont satisfies its burden by articulating a legitimate reason for its decision, the burden of production rebounds to Ms. Histed, who must now show by a preponderance of the evidence that DuPont's explanation is pretextural.

And the definition of pretext is, meaning offered for a

> purpose or motive alleged for
> an appearance assumed in order
> to cloak the real intention or state
> of affairs."

The jury rendered a verdict for DuPont.

Proceedings in the Court of Appeals

We appealed to the U.S. Court of Appeals for the Third Circuit, assigning error to the district court's evidentiary rulings and jury instructions, given that they had substantially affected Histed's right to prove her case.

In an unpublished opinion, the Third Circuit affirmed, agreeing with the district court that the jury must first reject the employer's reasons before it can find discrimination (Slip Op. at p. 4, Appendix at page 4a). We petitioned for rehearing *en banc,* because the panel opinion conflicted with Third Circuit law that a plaintiff can show discrimination without discrediting the employer's proffer, by proving either

that the proffered reasons incorporate bias, or that discrimination also affected the outcome. The rehearing petition was denied.

REASONS FOR GRANTING THE WRIT

The circuits are divided in their approach to the employer's proffered reason in a pretext case. Some seem to agree with the opinion below that the plaintiff's only option is to attack the proffer as hogwash, if not mendacious hogwash. Others acknowledge that an employer's action can be proved discriminatory even though it is based on credible justifications. This writ, if granted, would bring about uniformity on this important issue.

Leading the courts that require a successful attack on the credibility of the employer's proffer in a pretext case is the Seventh Circuit, with its "honest belief" defense. In *Clay v. Holy Cross Hospital*, 253 F.3d 1000, 1005 (7th Cir. 2001), for example, the Seventh Circuit stated:

> "On the issue of pretext, our only concern is the honesty of the employer's explanation,"

and it required the plaintiff squarely to rebut each and every legitimate reason the defendant offered for her discharge. *Clay, supra*, 253 F.3d at 1007.

The Eighth Circuit also recognizes the "honest belief" defense. *Sprenger v. Southern Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1112 (8th Cir. 2001). So does the Sixth. *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998). (Both, however, have permitted the plaintiff to attack the decisional process as flawed or biased as an alternative to simply attacking the proffered reason. See *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999) and *Smith v. Chrysler Corp., supra*, 155 F.3d at 807-808.)

The Tenth Circuit, by contrast, holds that the district court may not limit the pretext inquiry to a test of the

credibility of the employer's proffer. *Ortiz v. Norton*, 254 F.3d 889, 896 (10th Cir. 2001) (error for the district court in individual failure-to-promote case to focus exclusively on the employer's proffer and refuse to consider pattern and practice evidence).

Like the Tenth, the Third Circuit recognizes the bias route as an alternative to an attack on the credibility of the employer's stated reasons for its adverse action. *Bray v. Marriott Hotels*, 110 F.3d 986, 993 (3d Cir. 1997) (employer's proffered reason -- that it had picked the best applicant for the position -- must be open to challenge on the basis that the manager's perspective was warped by racial bias); *Miller v. Cigna Corp.*, 47 F.3d 586, 597 (3d Cir. 1995) (*en banc*), (district court's "sole cause" jury instruction was erroneous because it deprived the plaintiff of the chance to win where discrimination had a determinative influence on the outcome along with the employer's legitimate basis for its action); *Olson v. GE Aerospace*, 101 F.3d 947, 955 (3d Cir. 1996), (employer can be held liable for manager's decision that is free of discriminatory *animus*, if it is based on the biased recommendation of another).

Histed's petition for a writ of certiorari should be granted so that the conflict between these approaches to circumstantial proof can be resolved.

Respectfully submitted,
ALICE W. BALLARD
Law Office of Alice W. Ballard, P.C.
225 S. 15th Street, Suite 1700
Philadelphia, PA 19102
(215) 893-9708

THOMAS S. NEUBERGER,
Thomas S. Neuberger, PA
Two East Seventh Street, Suite 302
Wilmington, DE 19801
(302) 655-0582
Attorneys for Petitioner
Dated: October 15, 2001

UNREPORTED-NOT PRECEDENTIAL

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.00-1908

ARA HISTED

Appellant,

v.

E.I. DUPONT DE NEMOURS AND COMPANY

(Amended per Clerk Orders dated
7/14/00 and 7/19/00).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELA WARE
(D.C. Civil No. 98-cv-00039)
District Judge: The Honorable Roderick R. McKelvie

Submitted Under Third Circuit LAR 34.1(a)
January 22,2001

BEFORE: NYGAARD, ALITO, and ROSENN, Circuit Judges.

(Filed June 14, 2001)

MEMORANDUM OPINION OF THE COURT

NYGAARD, Circuit Judge.

Ara Histed sued E.I. Dupont de Nemours and Company asserting that it violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., the Age Discrimination in Employment Act of 1967, as amended, 29 U .S.C. §§ 621 et seq., and the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d)(1), for failing to promote her to the grade of Specialist in 1995 and 1996 because of her age and sex, and for failing to pay her wages equal to those of similarly situated male employees. The jury found in favor of Dupont, and the District Court entered judgment accordingly. Histed then filed a post-trial motion for judgment as a matter of law on her Equal Pay Act claim, which the District Court denied. Histed appeals raising the issues listed in Paragraph I below. We will affirm.

I. Issues

1. Whether the District Court abused its discretion in its ruling on the admission of various pieces of evidence.
2. Whether the District Court properly instructed the jury regarding the shifting burdens in a Title VII case.
3. Whether the jury reasonably concluded that the pay differentials between Histed and two of her co-workers were facially gender-neutral and not violative of the Equal Pay Act.

II. Discussion

Histed argues that the District Court incorrectly applied Federal Rules of Evidence 401 and 403, and incorrectly interpreted the law applicable to discrimination cases. She also argues that comments made by the District Court during a trial conference revealed that its view of the

scope of relevance, as well as its interpretation of discrimination case law, was too narrow. We disagree.

The District Court recited the text of F.R.E. 401, which defines relevant evidence. The Court stated that Histed misconstrued the term relevance because she felt that ". . . relevance is everything. Everything is relevant. Everything bears on - everything bears on everything." As we have stated, merely because a plaintiff incants "the proper uses of such evidence under the rule does not magically transform inadmissible evidence into admissible evidence; [r]elevance is not an inherent characteristic.'" *United States v. Morley*, 199 F.3d 129, 133 (3d Cir. 1999) (citation omitted).

The District Court stated during one of its rulings on evidence early in the trial that, "you'll see I'm very patient about theories of relevance. That any fact comes in, you can come up with an argument about how it's relevant. And unless it's an explosive fact . . .[u]nless it's really way off the reservation and can be misused, I won't keep it out. But on the other hand, if it comes in, it can't be used for illegitimate purposes." We cannot agree with appellant that based upon its comments, the District Court's view of the scope of relevance was too narrow; instead, we agree with the District Court that Histed's is simply too broad.

Histed also argues that the District Court incorrectly redefined the issue as whether Dupont's proffered reason was accurate or not, rather than as intentional discrimination *vel non*. In Fuentes v. Perksie, 32 F. 3d 759 (3d Cir. 1994), we instructed that the plaintiff has the ultimate burden to prove unlawful discrimination. As we reiterated *en banc* in *Sheridan v. E.I. Dupont de Nemours and Co.*, 100 F.3d 1061,1067 (3d Cir. 1999) *cert. denied*, 521 U.S. 1129, 117 S.Ct. 2532 (1997), (quoting *Fuentes*, 32 F.3d at 764), "in *Fuentes*, we explained that 'the factfinder may infer from the combination of the plaintiffs prima facie case and its own rejection of the employer's proffered non-discriminatory reasons that the employer unlawfully discriminated against

the plaintiff and was merely trying to conceal its illegal act with the articulated reasons."

Thus, it is only when the jury rejects the employer's reasons that a jury is permitted, but is not required, to find, that the real reason for the employment action was discrimination. The fact that the jury must first reject the employer's reasons before it can find discrimination is "the rationale for placing so much emphasis on the justification proffered by the employer," and the reason why pretext plays such a "pivotal role" in the "ultimate decision of discrimination *vel non*." *Smith v. Borough of Wilkinsburg*, 147 F .3d 272, 279 (3d Cir. 1998).

Here, the District Court was merely reiterating the law in pretext cases when it commented that the plaintiff must link her evidence to the issues the Dupont Company has put in issue. Histed's argument that the District Court improperly diminished the scope of relevance on the pretext prong of the Fuentes analysis is wrong.

Next, Histed argues that the District Court erroneously excluded her evidence of discrimination, citing the following five examples:

1. The comment from Tucker Kojohn that Histed was "lying;"
2. Histed's comment cards, called "360's;"
3. The remark attributed to John Snyder;
4. The remark from Histed's manager that he "goofed;" and,
5. Histed's failure to be promoted in 1999.

In the first instance, the District Court determined that the comment was irrelevant and inadmissible. The fact the Kojohn allegedly said to Histed that she was lying does not show that Dupont did not promote Histed because of her gender.

The District Court next determined that the "360's," or comment cards, did not fall under the business records exception, were hearsay, and were irrelevant because the promotions committee did not utilize the cards in making its

decisions. Histed's counsel conceded that the comment cards were hearsay. We need say no more.

Third, at a pretrial conference, the District Court determined the testimony including the stray remark from John Snyder was irrelevant and prejudicial under F.R.E. 403. The District Court stated, "I think the risk of confusion and prejudice from the statement outweighs the value of the statement." John Snyder was not a decision maker in the 1995 and 1996 promotions, and Histed's counsel acknowledged that fact. Any comment by Snyder was irrelevant to the decisionmaking process, and thus properly excluded.

As to the fourth example, Histed gives us no record citation. It does not appear to have been addressed in the pretrial order nor mentioned at the pretrial conference. When questioned during trial about Mr. Montovino, and what he said about promotions, Histed responded, "He said he had goofed." Dupont objected to this, and the District Court sustained the objection. The District Court did not abuse its discretion in ruling that this comment was hearsay.

One week before trial, appellant brought up some new material that she believed was evidence of failure to promote her in 1999, and she sought to introduce this into evidence to support her 1995 and 1996 failure to promote claims. The District Court properly determined that it was not relevant to mitigation of damages, to state of mind, pretext, failure to remedy, or as an admission, and thus properly excluded it as irrelevant.

Next, appellant argues that the District Court's instructions to the jury were inadequate on Title VII. She argues that the focus of the instructions was incorrectly on "the accuracy of Dupont's proffered reason," and that the Court improperly refused to give the examples of different types of inferential evidence listed by Histed in her proposed jury instructions. She then argues that the court incorrectly refused to give an instruction about "lying" and "the

employer's duty to investigate and remedy a claim of discrimination." Again, Histed's arguments are meritless.

We must consider and review the instructions as a whole. A full reading of the charge given to the jury on the Title VII issue, reveals that the trial court charged the jury in accordance with Third Circuit law. In *Wilkinsburg*, *supra*, we held that the jury must be instructed that they are:

> entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision.

Wilkinsburg, 147 F.3d at 280.

In *Wilkinsburg*, as here, the plaintiff appealed, claiming that the District Court incorrectly instructed the jury regarding pretext. However, in *Wilkinsburg*, it was the District Court's refusal to inform the jurors of the "pivotal role played by pretext in the ultimate decision of discrimination vel non" which required that we to layout this precise language required in the charge to a jury. 147 F .3d at 279. What Histed does not acknowledge is that this is the same language; recited almost verbatim, that the District Court used in its charge to her jury.

Histed's argument regarding the District Court's "erroneous focus on the accuracy of Dupont's proffered reason" is simply wrong because as *Wilkinsburg* specifically states:

> The rationale for placing so much emphasis on the justification proffered by the employer can be found in the statement made by Chief Justice, then Justice, Rehnquist who wrote that unexplained acts 'are more likely than not based on the consideration of impermissible factors. . . .[and] when all legitimate reasons

> for rejecting an applicant have been eliminated . . . it is more likely than not the employer . . . based his decision on an impermissible consideration

Wilkinsburg, 147 F.3d at 279 (quoting *Furnco Constr. Corp.*, 438 U.S. 567,577, 98 S.Ct. 2943, 2949 (1978)).

Histed's counsel knew of, and particularly relied on, *Wilkinsburg* before the District Court. Thus, her argument that the court incorrectly refused to include examples of circumstantial evidence is somewhat disingenuous. Moreover, we have specifically held that an instruction listing examples was "inadequate" as "jurors who found no evidence fitting the examples of circumstantial evidence referred to in the charge, but who disbelieved the employer's explanation could reasonably conclude that there was no evidence on which they would be permitted to base a plaintiffs verdict." Id. at 280.

Thus, the District Court did not use examples of circumstantial evidence, but encouraged Histed's counsel to argue those examples in his closing argument, which counsel did, in fact, do.[1] The District Court stated its view as: "My approach on instructions is to give the principles, not to give the applications as courts have applied it, but just to give the principles and then let you make the argument." This was an acceptable approach with which we find no fault.

As to Histed's remaining arguments, she has not cited any authority which indicates that the Webster's Dictionary definition of pretext, which the District Court read to the jurors, is incorrect. The term pretext is not some arcane term or legalistic jargon.

---

[1] The trial court instructed the jury to "consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves."

The District Court appropriately referred to the lay definition of this lay term to instruct the lay jury.

We find no authority that supports Histed's contention that an employer's duty to investigate and remedy must be part of the instructions to a jury in a Title VII case. We decline the invitation to find error where no law is shown nor found to support it.

Appellant also claims on appeal that Dupont failed to carry its burden under the Equal Pay Act, 29 U.S.C. §206 (d), by failing to show why James Trexler and Steve Dennis were paid differently for their work as Instrument Technicians. Under the Equal Pay Act, a plaintiff establishes a prima facie case by showing that employees of the opposite sex were paid differently for performing "equal work;" that is, work which is of substantially equal skill, effort, and responsibility under similar working conditions. See *EEOC v. Del. Dep't of Health & Soc. Servs.*, 865 F.2d 1408,1414 (3d Cir. 1989) (citation omitted). Only if the plaintiff meets her prima facie case does the burden shift to the employer to demonstrate an affirmative defense such as those suggested in the Act's text. *Corning Glass Works v. Brennan*, 417 U.S.188, 196 (1974).

The text of the Equal Pay Act includes four affirmative defenses to a charge of wage discrimination: (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex. 29 U.S.C. §206(d)(1). The "factor other than sex" is a broad general exception, as any list of "factors other than sex" would be incomplete and would hinder valid operation of a business with wage differentials, but with legitimate business reasons. *Corning Glass Works*, 417 U.S. at 198-99.

Here, we see no violation of the Equal Pay Act by Dupont. Rather, the evidence tends to show that Dupont acted in subjective good faith, and had objective, reasonable grounds to believe it was in compliance with the Equal Pay Act through the use of its compensation policy and the Salary

Action System. On appeal, Histed points to the pre-1995 salary of Trexler, and the "out of schedule" pay increases of Dennis as the basis other appeal on the Equal Pay Act.

With respect to Trexler, Histed pleaded no cause of action for the pre-May, 1995 comparison she seeks now on appeal. Her complaint was filed on January 16, 1998. Thus, for the purposes of the Equal Pay Act, only those salary discrepancies after January 16, 1996 are relevant, because the statute of limitations section for the Equal Pay Act expressly states that, ". . .every such action shall be forever barred unless commenced within two years after the cause of action accrued, ..." 29 U.S.C. §255(a); see also *EEOC*, 865 F.2d 1408,1411 n.4 (the Equal Pay Act contains a two-year statute of limitations). Hence, any cause she may have for actions before that date are barred.

Trexler's post-May, 1995 salary exceeding Histed's is supported by his promotion to Specialist, Level 2A, a higher pay level than Histed, who was a Level 2 Instrument Technician. Trexler testified at trial that he was making the top rate for Instrument Technician in 1994, not above. Dupont's Human Resources Manager for DFS, William Lee, testified that Trexler was administered under the SAS. This testimony created an issue of fact for the jury, which the jury resolved in Dupont's favor.

We conclude that there was evidence to support, and the jury reasonably concluded, that Dupont explained the pay differential on the basis of some factor other than gender, and decided that Dupont did not violate the Equal Pay Act.

With respect to Dennis, the difference in salary between Histed and Dennis is the result of a higher rate that followed him when he was transferred from another Dupont facility, and does not violate the Equal Pay Act. Here, the "factor other than Sex" exception includes a higher rate that happened to follow this transferred male employee to a new job site even though the rate was higher than the rate paid to Histed, irrespective of her sex. Retaining experienced employees such as Dennis, rather than incurring the expense

of search and training, is a legitimate gender-neutral business reason for this pay differential. Moreover, salary retention policies often are valid business reasons, to reward longevity or recognize past experience and seniority.

Moreover Dupont has a policy of reducing the salaries of "red circled" employees such as Dennis over time, by giving smaller increases under the Salary Action System. Dennis was a Leve12 Instrument Technician, who was transferred to Wilmington in August 1995 from Dupont's Sabine, Texas site. His salary at Sabine was higher than that permitted in Wilmington and it was being regressed through the Salary Action System.

Finally, appellant asserts that Dennis received "out of schedule" pay increases, and that such increases are proof of a willful violation of the Equal Pay Act. However, at trial, Mr. Lee testified: "The salary action system can, in some cases, give increases, even though they may be over the top rate of the job" He also testified that:

> [Dupont has] a standardized date for granting pay adjustments. And that date has been set for May lst. Now, if anything happens to an individual outside of that date, I'm not going to sit here and tell you that 850 people all get administered in May 1st. There are certain situations that may occur during the year that would be an exception to that. So I don't want to mislead you and say that an increase that's granted in the DFS organization is going to happen on May 1st.

Appellant also received "out of sequence" pay increases in October 1996, December 1994, December 1993, July 1992, January 1992, and on other dates confirmed by her salary history which was entered into evidence by Dupont. The jury, having heard that both appellant and Dennis received "out of sequence" salary increases, could conclude that gender played no role in the timing of the increases. The jury rendered a Special Verdict in this case specifically

determining that Dupont explained any pay differential on the basis or a factor other than gender.

III. Conclusion

In sum, we have examined all of Histed's arguments, and the record purporting to support them, and find no error by the District Court in the conduct of her trial. We will affirm.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Richard L. Nygaard

Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

Civil Action No. 98-39-RRM

ARA M. HISTED,

Plaintiff,

v.

DUPONT FACILITIES SERVICES, and E. I. DU PONT DE NEMOURS & COMPANY, INC.

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW

Having considered the briefing submitted by the parties and having reviewed the trial transcript.

IT IS HEREBY ORDERED as follows,

1. Plaintiff s Motion for Judgment as a Matter of Law (Docket Item 82) is denied. Based on the evidence presented at trial, the court finds that a reasonable jury could have found that the defendants did not willfully violate the Equal Pay Act.

_____

UNITED STATES DISTRICT JUDGE

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.00-1908

ARA HISTED

v.

E.I. DUPONT DE NEMOURS AND COMPANY

(Amended per Clerk Orders dated 7/14/00 and 7/19/00)

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 98-cv-00039)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge,
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ALITO,
ROTH, BARRY, AMBRO, FUENTES and ROSENN,
Circuit Judges.[2]

---

[2] The vote of the Honorable Max Rosenn, Senior Circuit Judge, is limited to panel rehearing only. See Third Circuit I.O.P.9.5.3.

The Petition for rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,
United States Circuit Judge

DATE: JUL 16 2001

Supreme Court, U.S.
FILED
NOV 13 2001
OFFICE OF THE CLERK

No. 01-641

In The

Supreme Court of the United States

ARA HISTED,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

RAYMOND MICHAEL RIPPLE
(Counsel of Record)
DONNA L. GOODMAN
Legal D-7012
E.I. DU PONT DE NEMOURS AND COMPANY
1007 Market Street
Wilmington, DE 19898
302/773-3072

Counsel for Respondent

November 2001

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

10 PP

RULE 29.6 STATEMENT

Respondent E.I. du Pont de Nemours and Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY PETITION SHOULD BE DENIED 1

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Clay v. Holy Cross Hospital, 253 F.3d 1000 (7th Cir. 2001) 2

Gordon v. United Airlines, Inc., 246 F.3d 878 (7th Cir. 2001) 2

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) 2

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 132, 120 S.Ct. 2097 (2000) 2, 3

STATEMENT OF THE CASE

Petitioner, Ara Histed, ["Petitioner" or "Histed"] originally brought this action in 1998 in the United States District Court for the District of Delaware as an age and sex-based failure to promote case. Petitioner also claimed that she was not paid in a manner equal to similarly situated male employees. The case was tried to a jury, which completely exonerated DuPont. In the course of instructing the jury, the district court clearly stated that Histed could prove pretext either by "throwing doubt" on DuPont's explanation for its personnel action, or by using an alternative route of pointing to evidence that discrimination was the more likely cause for her not being promoted. [Pet. 6].

The United States Court of Appeals for the Third Circuit affirmed the judgment in all respects. [App. 1a-11a]. In doing so, the court of appeals properly noted that a jury in an employment case tried under the pretext formula must reject the employer's proffered reasons in order to find that the real reason for the employment action was discrimination. [App. 4a]. The court of appeals denied a Petition for Rehearing and Rehearing En Banc on July 16, 2001. [App. 14a]. This Petition followed.

REASONS WHY PETITION SHOULD BE DENIED

1. Petitioner attempts to construct a split of opinion among the circuits as the sole basis for a need for this Court to review the decision below. Petitioner argues that some circuits require a plaintiff to attack the "credibility" of the employer's proffer of a non-discriminatory reason

for the employment action while others do not. [Pet. 8-9]. Petitioner's construct of a conflict among the circuits is illusory.

As Petitioner properly concedes [Pet. 8-9], there is no material difference in the approaches of the Third, Sixth, Eighth, and Tenth Circuits to the process of establishing pretext in a case, such as the instant one, that is tried under the template of the shifting burdens of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

The Seventh Circuit, especially since this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 132, 120 S.Ct. 2097 (2000), clearly follows the proposition that a plaintiff needs to "squarely rebut" the employer's articulated reason for the employment decision under review. *Clay v. Holy Cross Hospital*, 253 F.3d 1000, 1007 (7th Cir. 2001). This approach is firmly aligned with this Court's most recent guidance in this type of case that the plaintiff must ultimately show that the employer's reasons are unworthy of credence and were a mere pretext for discrimination. *Reeves*, 530 U.S. at 143, 120 S.Ct. at 2106. Indeed, the Seventh Circuit continues to adhere to the formula that evidence of pretext may fall into the categories which prove the employer's proffered reasons are factually baseless, were not the actual motivation, or were otherwise insufficient to motivate the action involved in the individual case. *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 888 (7th Cir. 2001). Thus, no real, deep, or abiding conflict exists among the circuits.[1]

---

[1] To the extent Petitioner intimates that the instant decision creates an internal conflict within the Third Circuit [Pet. 9], it

2. In an attempt to squarely cast this case on one side of Petitioner's perceived split among the circuits, Petitioner focuses on the jury charge and comments made by the district court, and the affirmance of these actions by the Third Circuit panel. [Pet. 3-7]. Petitioner attempts to show that the jury charge and comments by the district court reveal the "narrow focus" of pretext law of the district court and the Third Circuit panel. [Pet. 5, 7].

Petitioner complains that the district court "refused" to give examples of different types of inferential evidence in its charge because of its "narrow focus." [Pet. 5, 6]. However, the district court specifically encouraged Petitioner to argue such examples in closing argument, which Petitioner's counsel did, in fact, do. [App. 7a]. Moreover, the district court's "either/or" charge conforms to the position that Petitioner takes in her Petition [Pet. 1, 6], and is consistent with guidance from this Court. *Reeves*, 530 U.S. at 143, 170 S.Ct. at 2106. Consequently, Petitioner's real concern lies with the evidentiary rulings of the district court.

Petitioner's evidentiary complaints center around comments made by the district court during a trial conference. [Pet. 4-5]. Petitioner suggests that these comments reveal that the district court's view of the scope of relevance was too narrow. [Pet. 3-4, 5]. Contrary to Petitioner's assertions, the district court's rulings were not based on the "narrow focus" of "employer veracity *vel*

---

was resolved in rejection of her unsuccessful petition for *en banc* review and is otherwise unworthy of plenary review by this Court.

non." [Pet. 1, 5]. Rather, the rulings were merely based on the Federal Rules of Evidence.

During one of its initial rulings on evidence, the district court stated that it would not keep any evidence out as long as the party could develop an argument about how the evidence was relevant. [App. 3a]. Further comments by the district court reveal that its rulings were in accord with the Federal Rules of Evidence. In fact, the district court recited *verbatim* the text of F.R.E. 401 in its comments, and cautioned Histed that she misconstrued the term relevance to mean that " '[e]verything is relevant.' " [App. 3a; Pet. 4]. As stated by both the court of appeals and the district court, "Histed's [view of the scope of relevance] is simply too broad." [App. 3a]. It is this broad view of the scope of relevance that now causes Petitioner to complain.

More specifically, Petitioner lists her alleged "proof of bias" that she claims was improperly excluded by the district court because of its "narrow focus." [Pet. 5]. However, a review of the evidentiary rulings shows that these pieces of evidence were not excluded based on some misperceived "narrow focus" of the district court "about how to prove discrimination," as stated by Petitioner. [Pet. 5]. Rather, these pieces of evidence were excluded because they simply were inadmissible under the Federal Rules of Evidence.

For example, the "evidence that the promotions committee willingly chose not to look at . . . which put Histed in her best light" were Petitioner's comment cards. [Pet. 5; App. 4a]. These comment cards were found by the

district court to be inadmissible because they were hearsay, not falling under the business records exception, and were irrelevant because the promotions committee did not use the cards when it made its decisions. [App. 4a-5a]. In fact, Petitioner's counsel has conceded that the comment cards were hearsay. [App. 5a].

In addition, Petitioner's allegation that her "new supervisor as of the time of trial was trying to get her promoted and was mystified that he could not accomplish it" [Pet. 5], related to her failure to be promoted in 1999. However, Petitioner's Complaint clearly spelled out that her case was failure to promote in 1995 and 1996. [*See* Pet. 3; App. 5a]. She only revealed this new evidence and new allegation of failure to promote in 1999 a week before trial at a pre-trial conference. [App. 5a]. The district court gave Petitioner every opportunity to articulate a theory as to why this evidence was relevant, and then properly determined that it was not relevant to mitigation of damages, to state of mind, to pretext, or as evidence of a failure to remedy, or as an admission. [App. 5a]. Thus, the district court properly excluded this evidence under the Federal Rules of Evidence. [App. 5a].

Moreover, Petitioner's allegation that "one manager told Histed he 'had goofed . . . it shouldn't have been' " was also properly excluded. [Pet. 5]. Petitioner never referenced a record citation for this comment during briefing below. [App. 5a]. The only reference found in the record was during direct examination of Petitioner when she was asked what a Mr. Montovino had said about the way the 1995 promotions had been handled and she responded, " 'He said he had goofed.' " [App. 5a]. This testimony was objected to as hearsay, and the objection

was sustained by the district court. [App. 5a]. Thus, the comment was properly excluded as hearsay under the Federal Rules of Evidence. [App. 5a].

As such, the examples of evidence that Petitioner lists as "proof of bias" were simply inadmissible under the Federal Rules of Evidence. These are very ordinary evidentiary rulings, completely reviewed by the court of appeals, and unworthy of further review by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND MICHAEL RIPPLE
(*Counsel of Record*)
DONNA L. GOODMAN
Legal D-7012
E.I. DU PONT DE NEMOURS
AND COMPANY
1007 Market Street
Wilmington, DE 19898
302/773-3072

Counsel for Respondent